Declaratory Judgments -- Insurance

Moses Braxton Gillam Jr.

complicity in one is extremely weak evidence of identity with the other. The principal case, then, is apparently unsupported by the cases cited by the court, and seems definitely out of line with prior decisions involving the use of testimony as to other offenses to prove identity.

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Declaratory Judgments—Insurance.

Plaintiff, insurer, issued life policies to defendant, the insured, providing for waiver of premiums and payment of benefits in the event of the insured's becoming disabled. Having refused to allow repeated claims for disability benefits, the insurer sought declaratory relief in a federal court to the effect that the insured was not disabled and that the policies were void for non-payment of premiums. *Held,* by the Supreme Court, the Federal Declaratory Judgment Act[1] is constitutional, and a controversy was presented in which the insurer was entitled to declaratory relief.[2]

In spite of three adverse Supreme Court dicta,[3] it has been assumed generally that the Federal Declaratory Judgment Act, if invoked in an actual controversy,[4] is valid. This assumption has found support in numerous decisions of state courts sustaining similar legislation,[5] in the Supreme Court's apparent change of attitude in *Nashville, Chattanooga, and St. Louis Ry. v. Wallace,*[6] and in favorable decisions in the lower federal courts.[7] The principal case is, however, the first square holding by the Supreme Court that the Federal Act is constitutional. The decision is equally significant as an indication of the increasing utility of the declaratory judgment in insurance cases.[8]

[1] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (Supp. 1936). Compare with North Carolina Declaratory Judgment Act, N. C. CODE ANN. (Michie, 1935) §628.

[2] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461, 81 L. ed. Adv. Ops. 394 (1937).

[3] Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282, 71 L. ed. 541 (1927); Liberty Warehouse Co. v. Burley Tobacco Growers' Coöperative Marketing Ass'n, 276 U. S. 71, 88, 48 Sup. Ct. 291, 294, 72 L. ed. 473, 479 (1928); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 289, 48 Sup. Ct. 507, 509, 72 L. ed. 880, 884 (1928). Cases criticized, Borchard, *The Supreme Court and the Declaratory Judgment* (1928) 14 A. B. A. J. 633, 635.

[4] U. S. CONST. Art. III, §2; Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246 (1911). The Federal Act, cited *supra* note 1, limits the power to grant declaratory judgments to "cases of actual controversy."

[5] State v. Grove, 109 Kan. 619, 201 Pac. 82 (1921); Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. Supp. 297 (1922); Carolina Power and Light Co. v. Iseley, 203 N. C. 811, 167 S. E. 56 (1933); Petition of Kariher, 284 Pa. 455, 131 Atl. 265 (1925).

[6] 288 U. S. 249, 264, 53 Sup. Ct. 345, 348, 77 L. ed. 730, 736 (1933) (declaratory judgment under Tennessee Statute held to be entitled to review in the Supreme Court).

[7] Commercial Casualty Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935); Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (C. C. A. 5th, 1936).

[8] For a more extended treatment of the declaratory judgment and the insurance contract see: Morrison, *Availability of the Federal Declaratory Judgment Act for Life Insurance Cases* (1937) 23 A. B. A. J. 788; comment (1936) 46 YALE L. J. 286.

An insurance policy may be invalid because of fraud or misrepresentation in its procurement, or it may lapse for breach of conditions or non-payment of premiums. Whatever the cause of the policy's becoming inoperative, where there is a dispute between insurer and insured as to its validity, it is to the advantage of the insurer to secure a final adjudication of the dispute as soon as possible. The insurer may notify the insured of the rescission of the policy, but if the insured denies the insurer's right to rescind and there is any doubt about the matter, the insurer is forced to maintain reserves to cover the policy until its action has been upheld by the courts. In the principal case the policies would continue in force under the waiver clause, in spite of failure to pay the premiums, if the insured were actually disabled. But the insured delayed bringing suit for disability benefits, and the question of his disability remained undetermined. Although the Statute of Limitations would begin to run against the insured as to the disability benefits, it would not operate against the beneficiary until the latter's cause of action should accrue upon the death of the insured. The insured might not die until twenty or thirty years later, and at his death the beneficiary might bring an action on the policy, prove that the insured was disabled, that payment of premiums was unnecessary, and thus recover from the insurer. Throughout those years the insurer would have to set aside reserves to cover the policy and, unless permitted to take the initiative in bringing the controversy before the courts, would have to await passively an action by the other parties. Meanwhile many of its important witnesses might die or disappear and the memory of those remaining would be dimmed by the passage of time,[9] with the result that its defenses would become materially weakened.[10]

Before the enactment of declaratory judgment statutes the remedy of the insurer was the bill in equity for cancellation. But equitable relief was available only when the remedy at law was inadequate.[11] In order to show this inadequacy it was not sufficient to prove fraud or misrepresentation in procurement of the policy[12] or that the insured

[9] The insurer might be protected to some extent by a bill to perpetuate testimony or its equivalent under the codes. N. C. CODE ANN. (Michie, 1938) §1822(1)-(4); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §985; WALSH, EQUITY (1930) §116.

[10] An even more serious dilemma is presented by the disputed policy when it has been issued by a mutual company, in which the policy-holder is entitled to a voice in the management and a share in the profits. Until disputes of this kind are adjudicated there is a problem as to which policy-holders are entitled to vote in elections and share in the surplus of the company.

[11] Note (1935) 97 A. L. R. 572.

[12] Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wallace 616, 20 L. ed. 501 (1871); Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. ed. 188 (1903); Aetna Life Ins. Co. v. Smith, 73 Fed. 318 (C. C. E. D. N. C. 1896); N. Y. Life Ins. Co. v. Miller, 73 F. (2d) 350 (C. C. A. 8th, 1934); Globe Mutual Life Ins. Co. v. Reals, 79 N. Y. 202 (1879). *Contra:* John Hancock Mutual Life Ins. Co. v. Dick, 114 Mich. 337, 72 N. W. 179 (1897). Cancellation has also been

had defaulted in payment of premiums.[13] It was necessary, in addition, to prove special circumstances under which the insurer would suffer not merely inconvenience but irreparable injury if left to its defenses.[14] Such circumstances could be proved by showing that the policy contained an incontestable clause,[15] for unless the insurer were allowed to sue in equity before the expiration of the contestable period he would be in danger of losing forever his right to contest upon grounds covered by the clause. The incontestable clause does not apply where the policy is contested for non-payment of premiums or breach of condition subsequent, and in such cases the presence of the clause in the policy does not make the remedy at law inadequate.

Insurance companies have sought to obtain through the declaratory judgment a more complete remedy than that afforded by the bill to cancel. The declaratory judgment provides a speedy and effective method of determining whether insurance policies are valid and operative by allowing the insurer to take the initiative in obtaining an adjudication of the issues. Policy-holders and beneficiaries have no legitimate complaint against its use since the right of jury trial upon questions of fact is specifically provided.[16] The public, as well as the insurer, has a vital interest in the efficient management of insurance companies, and both should benefit by the elimination of uncertainty and delay. In deciding upon the applicability of the declaratory judgment to suits by the insurer to determine its liability upon a policy, courts have been faced with three problems: (1) whether such a suit presents an actual controversy, (2) whether a declaration of immunity from liability is a declaration of "rights and other legal relations,"[17] and (3) whether the availability of another remedy precludes declaratory relief.

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refused on the grounds of an adequate remedy at law in Griesa v. Mutual Life Ins. Co., 169 Fed. 509 (C. C. A. 8th, 1909) (where insured committed suicide) and in Imperial Fire Ins. Co. v. Gunning, 81 Ill. 236 (1876) (where policy-holder set fire to insured property).

[13] Bank Savings Life Ins. Co. v. Wood, 122 Kan. 831, 253 Pac. 431 (1927); Globe Mutual Life Ins. Co. v. Reals, 79 N. Y. 202 (1879).

[14] The danger of loss of testimony is not sufficient to make the remedy at law inadequate. Aetna Life Ins. Co. v. Smith, 73 Fed. 318 (C. C. E. D. N. C. 1896); Nat. Life and Accident Ins. Co. v. Propst, 219 Ala. 437, 122 So. 656 (1929); Town of Venice v. Woodruff, 62 N. Y. 462 (1875) (action by municipality to cancel bonds); Globe Mutual Life Ins. Co. v. Reals, 79 N. Y. 202 (1879). *Contra:* Conn. Mutual Life Ins. Co. v. Home Ins. Co., 6 Fed. Cas. No. 3,107 (C. C. D. Conn. 1879).

[15] N. Y. Life Ins. Co. v. Seymour, 45 F. (2d) 47 (C. C. A. 6th, 1930); N. Y. Life Ins. Co. v. Rigas, 117 Conn. 437, 168 Atl. 22 (1933); Travelers' Ins. Co. v. Snydecker, 127 Misc. 66, 215 N. Y. Supp. 277 (1926); see Am. Trust Co. v. Life Ins. Co. of Va., 173 N. C. 558, 567, 92 S. E. 706, 711; note (1931) 73 A. L. R. 1529.

[16] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (3) (Supp. 1936).

[17] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (1) (Supp. 1936).

The principal case decides that in such suits an actual controversy exists and that a declaration of non-liability is a declaration of "rights and other legal relations." The third problem has caused the greatest confusion among the state and lower federal courts. A number of courts have applied equity rules to petitions for declaratory judgments, refusing relief where there is a so-called adequate remedy at law,[18] and requiring the insurer to wait and defend a future suit. Other courts, taking a more practical view of the situation, have refused to apply such a restriction.[19] The provision in the statute for declarations "whether or not further relief is or could be prayed"[20] and the result in the principal case, although the issue was not raised, would seem to indicate that the existence of another remedy is no absolute bar. Although the availability of another remedy should not, as a matter of law, automatically bar a declaratory judgment, the fact of its existence may be properly considered by the court in determining whether, in the exercise of its sound discretion, it should refuse declaratory relief. In *Aetna Casualty and Surety Co. v. Quarles*,[21] the insurer asked for a declaration that it was not liable to a judgment creditor of the insured, holder of an automobile liability policy. A suit by the judgment creditor against the insurer, as provided in the policy, was already pending. The Fourth Circuit Court of Appeals held a refusal to grant a declaratory judgment under the circumstances to be a proper exercise of judicial discretion.

The extent of the courts' discretion to refuse relief under the Fed-

[18] Western Casualty and Surety Co. v. Beverforden, 17 F. Supp. 928 (W. D. Mo. 1936); Columbia Nat. Life Ins. Co. v. Foulke, 13 F. Supp. 350 (W. D. Mo. 1936), *rev'd*, 89 F. (2d) 261 (C. C. A. 8th, 1937); Associated Indemnity Corp. v. Manning, 16 F. Supp. 430 (W. D. Wash. 1936) *semble;* Brindley v. Meara, 198 N. E. 301 (Ind. 1935) (dispute between advisory board and trustee of township); Merchants' Mutual Casualty Co. v. Leone, 9 N. E. (2d) 553 (Mass. 1937); Wolverine Mutual Motor Ins. Co. v. Clark, 277 Mich. 633, 270 N. W. 167 (1936); Stewart v. Herten, 125 Neb. 210, 249 N. W. 552 (1933) (involving appointment of guardian); Reynolds v. Chase, 177 Atl. 291 (N. H. 1935) (involving construction and validity of contract); see Babcock v. Babcock, 147 Misc. 900, 903, 265 N. Y. Supp. 470, 474 (1933) (alimony suit).

[19] Equitable Life Assurance Soc. v. Templeton, 19. F. Supp. 485 (E. D. S. C. 1936); Aetna Life Ins. Co. v. Williams, 88 F. (2d) 929 (C. C. A. 8th, 1937); Columbia Nat. Life Ins. Co. v. Foulke, 89 F. (2d) 261 (C. C. A. 8th, 1937); Anderson v. Aetna Life Ins. Co., 89 F. (2d) 345 (C. C. A. 4th, 1937); Stephenson v. Equitable Life Assurance Soc. (C. C. A. 4th, Sept. 29, 1937) (suit by insured against insurer). Declaratory judgments have been held proper, without discussion of the effect of the availability of other remedies, in the following suits by the insurer where the remedy at law would be considered adequate: Ohio Casualty Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex. 1935); Commercial Casualty Co. v. Humphrey, 13 F. Supp. 174 (S. D. Tex. 1935); Travelers' Ins. Co. v. Helmer, 15 F. Supp. 355 (N. D. Ga. 1936); Travelers' Ins. Co. v. Young, 18 F. Supp. 450 (D. N. J. 1937); American Motorists' Ins. Co. v. Central Garage, 86 N. H. 362, 169 Atl. 121 (1933); Glens Falls Indemnity Co. v. Keliher, 187 Atl. 473 (N. H. 1936). See BORCHARD, DECLARATORY JUDGMENTS (1934) 149.

[20] 48 STAT. 955 (1934) as amended 49 STAT. 1027 (1935), 28 U. S. C. A. §400 (1) (Supp. 1936).

[21] C. C. A. 4th, Sept. 29, 1937.

eral Declaratory Judgment Act is not clear. Whatever discretion exists is a judicial discretion subject to appellate review.[22] The Uniform Declaratory Judgment Act, which has been adopted in North Carolina, makes refusal of declaratory relief discretionary where the uncertainty or the controversy giving rise to the proceeding would not be terminated.[23] There is no such provision in the Federal Act, and it has been strongly contended that the federal courts have no power to refuse to entertain jurisdiction in the exercise of a discretion not based upon an established rule of law.[24] In the *Quarles* case the court takes the position that it is implied that the granting of declaratory judgments shall rest in the court's discretion, since the statute merely gives the court power to grant the remedy without prescribing conditions under which it is to be granted. The possibility that the useful purpose of declaratory judgment statutes may be defeated by an abuse of judicial discretion is a danger that should be carefully guarded against. In the *Quarles* case, however, the granting of a declaratory judgment after an action had been brought against the insurer was unnecessary, and the decision is to be commended as an intelligent exercise of the court's discretion under the Federal Declaratory Judgment Act.

MOSES BRAXTON GILLAM, JR.

Equity—Extent of Injunction Against Nuisances.

Plaintiffs petitioned to enjoin as a nuisance a roadhouse situated in plaintiffs' neighborhood. A dancing pavillion was operated in connection with the roadhouse where music was continuously played, and where patrons remained throughout the night cursing, gambling, drinking, and fighting. Notwithstanding the fact that some of the acts connected with the operation of the business were legitimate, the decree granted by the court enjoined the operation of the business in its entirety.[1]

As shown by the principal case, a lawful business may become a nuisance by reason of the manner of its operation.[2] In framing a decree to enjoin such nuisances most courts in the absence of a statute hold that there cannot be abatement to the extent of closing out the whole busi-

[22] BORCHARD, DECLARATORY JUDGMENTS (1934) 100.
[23] UNIFORM DECLARATORY JUDGMENT ACT §6, 9 UNIFORM LAWS ANN. 127; N. C. CODE ANN. (Michie, 1935) §628(e).
[24] Morrison, *Availability of the Federal Declaratory Judgment Act for Life Insurance Cases* (1937) 23 A. B. A. J. 788, 791.

[1] Hunnicutt v. Eaton, 191 S. E. 919 (Ga. 1937).
[2] Nevins v. McGavock, 214 Ala. 93, 106 So. 597 (1925); Junction City Lumber Co. v. Sharp, 92 Ark. 538, 123 S. W. 370 (1909); Sullivan v. Royster, 72 Cal. 248, 13 Pac. 655 (1887); Gilbert v. Davidson Constr. Co., 110 Kan. 298, 203 Pac. 1113 (1922); Block v. Fertitta, 165 S. W. 504 (Tex. 1914); LEWIS AND SPELLING, INJUNCTIONS (1926) §288.